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No. 07-1510

Supreme Court, U.S.
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In The

Supreme Court of the United States

DENISE DEHNING,

Petitioner,

v.

CHILD DEVELOPMENT SERVICES
OF FREMONT COUNTY, et al.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

		Page
Table of Contents		i
Table of Authorities		ii
I.	Statement Of The Case	1
II.	Argument For Denying The Writ	10
	A. Summary Of Argument	10
	B. Plaintiff's Allegations That Her Constitutional Rights To Due Process Have Been Violated By A Body Designed To Protect Such Rights	11
	C. Plaintiff's Allegations That The Tenth Circuit Erred In Affirming A Decision Of A District Court Clearly Conflicting With Contract Law Established In All Jurisdictions	12
	1. Meeting Of The Minds	12
	2. Parties Intended To Complete The Agreement In Writing	17
	D. The Finding Of The District Court That The Statute Of Frauds Was Inapplicable Is Not Clearly Erroneous	19
III.	Conclusion	20

TABLE OF AUTHORITIES

Page

CASES

Alder v. WalMart Stores, Inc., 144 F.3d 664 (10th Cir. 1998) 10

Bogwater North America Corp. v. Murray Machinery, 773 F.2d 71 (6th Cir. 1985) 12

Brockman v. Sweetwater County School District #1, 826 F. Supp. 1328 (USDC, District of Wyoming, 1993) 12

Brockman v. Sweetwater County School District #1, 25 F.3d 1055 (10th Cir. 1994) 12

Clay v. Hanson, 536 A.2d 1097 (D.C. 1988) 20

Dangerfield v. Markel, 252 N.W.2d 184 (N.D. 1977) 20

Eastern Energy, Inc. v. Unico Oil & Gas, Inc., 861 F.2d 1379 (5th Cir. 1988) 12

EEOC v. PVF, F.3d 790 (10th Cir. 2007) 10

Flight Systems, Inc. v. Electric Data Systems, Corp., 112 F.3d 124 (3rd Cir. 1997) 20

Gibson v. Arnold, 288 F.3d 1242 (10th Cir. 2002) 20

Givens v. Fowler, 984 P.2d 1092 (Wyo. 1999) 14

Jackson Hole Builders v. Piros, 654 P.2d 120 (Wyo. 1982) 12

McDonald v. Mobil Coal Producing, Inc., 820 P.2d 986 (Wyo. 1991) 17

Mead v. Leo Sheep Co., 232 P. 511 (Wyo. 1925) 20

TABLE OF AUTHORITIES – Continued

Page

Orr v. City of Albuquerque, 417 F.3d 1144 (10th Cir. 2005) 19

Peter's Grazing Ass'n v. Legerski, 544 P.2d 449 (Wyo. 1975) 12

Robert W. Anderson Housewrecking and Excavating, Inc. v. Board of Trustees, School District No. 25, Fremont County, Wyoming, 681 P.2d 1326 (Wyo. 1984) 17

Wallis v. Bosler, 246 P.2d 771 (Wyo. 1952) 20

Wyoming Sawmills, Inc. v. Morris, 756 P.2d 774 (Wyo. 1988) 13

RULES

Rule 10 of the Rules of the Supreme Court of the United States 10

Rule 15.2 of the Rules of the Supreme Court of the United States 1

OTHER AUTHORITIES

73 *Am. Jur. 2d*, Statute of Frauds § 478 20

I. STATEMENT OF THE CASE

Rule 15.2 of the Rules of the Supreme Court of the United States points out that a Brief in Opposition "should address any perceived misstatement of fact or law in the Petition that bears on what issues properly would be before the Court if Certiorari were granted." To do so in this case would far exceed the word limit imposed by this Court as Ms. Dehning, appearing Pro Se, in her narration of the facts, does not limit herself to the facts contained within the record, and indeed does not cite to the record at all. Respondents will therefore simply point out the pertinent facts with appropriate citation to the record.

Child Development Services of Fremont County ("CDS") is a non-profit organization that contracts with the Department of Health to deliver services to developmentally disabled children, birth through age five (5), in Fremont County, Wyoming. (R. vol. 4, p. 31). Alfred "Al" McClelland was the Executive Director of CDS. (R. vol. 4, p. 31). Scott Carlson is the Special Education Director for CDS. (R. vol. 4, p. 31). The remaining Defendants were all volunteer board members for CDS. (R. vol. 1, doc. 1).

Plaintiff Denise J. Dehning has a four-year undergraduate degree and a masters degree in health science. (R. vol. 4, pp. 82, 83). In 2003, Denise J. Dehning was hired to be a physical therapist for CDS for the 2003-2004 school year. (R. vol. 2, doc. 1).

On April 27, 2004, Denise J. Dehning reported to Al McClelland that she felt that she was being sexually harassed by Scott Carlson and it was suggested by Al McClelland that she file a written grievance. (R. vol. 2, doc. 4, p. 1). On May 1, 2004, Denise J. Dehning filed a written grievance against Scott Carlson and also a written grievance against Al McClelland as she felt that he had not taken her seriously when she reported the sexual harassment on April 27, 2004. (R. vol. 2, doc. 4, p. 1).

On July 15, 2004, Denise J. Dehning filed a charge of discrimination with the EEOC for unwelcome sexual harassment. (R. vol. 2, doc. 18). The EEOC issued its Dismissal and Notice of Rights on May 31, 2005, to the complaint of sexual harassment filed July 15, 2004, which dismissed her complaint and gave her notice that she could file a lawsuit within 90 days of her receipt of the notice. (R. vol. 2, doc. 44). When Denise J. Dehning expressed her concern about the dismissal and requested an explanation, Jenette M. Leino, Acting District Director gave the following explanation for the dismissal:

> In your Charge of Discrimination filed on July 14, 2004, you alleged that you were subjected to sexual harassment by your supervisor, Mr. Scott Carlson. In the documents that you submitted, you stated the following incident of harassment occurred:
>
> Mr. Carlson teased you from a distance and tried to seek your attention in September 2003. In October 2003, Mr. Carlson, sat

across the table from you during a luncheon and talked to you more often than the others present. On November 4, 2003, Mr. Carlson joked that they should send the police out looking for you and asked whether you were at "Good Time Charlie's". Mr. Carlson leaned on the counter next to you. On five occasions, Mr. Carlson talked beside you instead of facing you. Mr. Carlson whispered a tease in your ear in reference to your driving after a snowstorm.

Mr. Carlson asked you several times if the company Christmas party could continue at your house. Mr. Carlson found excuses to visit you. On January 9, 2004, during a practice CPR session using an infant doll, Mr. Carlson made a comment that you "blew its brains out." On February 6, 2004, Mr. Carlson made the comment that he and Diane were mad that you would not let them watch a movie (Christmas Vacation) at your place after the Christmas party.

In your statement dated May 1, 2004, you stated that Mr. Carlson never used sexual words with you and you felt that he was seeking your attention.

In determining whether unlawful sexual harassment has occurred, the EEOC considers whether the frequency and severity of the conduct create a hostile work environment. The definition may vary from individual to individual; therefore, the courts have recognized a "reasonable person" standard. In

> your case, several incidents occurred over a six month period; however, a review of the incidents does not show severity or that the conduct was hostile, patently offensive or sexually motivated.
>
> I have again reviewed the evidence in your case and find that the totality of the evidence presented in your case did not rise to the level of unlawful sexual harassment. In addition, you took appropriate steps by discussing the conduct with you supervisor and the Executive Director. The conduct did not continue. For these reasons, Charge 32K-2004-00184 was dismissed.

(R. vol. 2, doc. 52, pp. 1-2).

On September 8, 2004 Denise J. Dehning filed another charge of Discrimination with the EEOC alleging retaliation for having reported the allegation of sexual harassment to her employer. The retaliation was alleged to have been the failure to be offered a raise from the previous year as received by similarly situated employees and that she wasn't rehired for the 2004-2005 school year. (R. vol. 2, doc. 23).

Denise Dehning, through her attorney, Donald Rissler, filed suit alleging sexual harassment and retaliation in the District Court for the District of Wyoming. (R. vol. 1, doc. 1). On April 3, 2006, a mediation was held between the parties at the law office of Joseph E. Vlastos in Casper, Wyoming. (R. vol. 3, def. ex. 1). Mr. Vlastos had practiced as an attorney

for over 40 years and had done "right at 300" mediations over the last six years. (R. vol. 4, p. 17).

Prior to the mediation both parties had submitted a Mediation Statement. The Mediation Statement which was filed by Donald Rissler, had been reviewed and approved by his client Denise J. Dehning. (R. vol. 4, p. 42, pp. 78-79). The Mediation Statement submitted on behalf of Denise J. Dehning started out; "This is a sexual harassment and retaliation case." and went on to describe various sexual harassment claims of Denise J. Dehning as well as her retaliation claim. (R. vol. 3, def. ex. 9; vol. 4, pp. 42-44). The mediator, Mr. Vlastos, understood the subject matter of the mediation was in the nature of sexual harassment discrimination and also retaliation. (R. vol. 4, pp. 18-19). Denise Dehning's attorney, Donald Rissler, also understood that the mediation involved the issues of retaliation as well as sexual harassment. (R. vol. 4, p. 6). Prior to the mediation, Denise J. Dehning had checked out a sexual harassment book from the public library and during the mediation had pointed out to her attorney several sections in the book that had to do with sexual harassment law and the rule of damages. (R. vol. 4, p. 61).

At the end of the day on April 3, 2006, a settlement agreement was reached. (R. vol. 3, def. ex. 1). The agreement was set out orally by Mr. Vlastos with all parties present and included all the terms set out in the follow-up mediation/settlement conference letter to the attorneys dated April 4, 2006. (R. vol. 4, pp. 26, 32, 41, 59). Mr. Vlastos, Al McClelland, and

Donald Rissler all testified that Denise Dehning specifically stated that she agreed with all the terms. (R. vol. 4, pp. 27, 32, 60).

Denise J. Dehning, herself, testified that on April 3, 2006, Mr. Vlastos recited the terms as more particularly set out in his subsequent letter of April 4, 2006, and that she agreed to the terms of the settlement agreement. (R. vol. 4, pp. 41-42). Denise J. Dehning did not have any questions about the settlement agreement when it was presented to her and the other parties when she gave her assent on April 2, 2006. (R. vol. 4, p. 60).

The settlement agreement between the parties recited orally and set out in the April 4, 2006 letter of Mr. Vlastos, provided that in return for the payment of $30,000.00 and a one (1) year Independent Contractor Agreement Denise J. Dehning would release all claims against the Respondents. (R. vol. 3, def. ex. 1).

Pursuant to the settlement agreement Donald Rissler prepared the Release document and Sky D Phifer, Attorney for CDS et al., prepared the Independent Contractor Agreement. (R. vol. 4, pp. 63-64). At the request of Denise J. Dehning and her attorney changes were made to the Independent Contractor Agreement. (R. vol. 4, pp. 61, 71).

When Denise J. Dehning met with Donald Rissler at his office to sign the documents, Denise J. Dehning refused to sign claiming she agreed to settle only her retaliation claim, not her sexual harassment

claim and left Mr. Rissler's office to more thoroughly review the documents, and within a few days fired Mr. Rissler. (R. vol. 4, pp. 43, 63-64). Donald Rissler had asked Denise J. Dehning to stay in his office to work out any changes, which Denise J. Dehning refused. (R. vol. 4, pp. 84, 65-66).

Upon being informed that Denise J. Dehning refused to sign the final paperwork, Child Development Services, et al. filed a Motion to Enforce the Settlement Agreement. (R. vol. 1, doc. 18).

On May 22, 2006, Donald Rissler filed a Motion to Withdraw as attorney for Denise J. Dehning due to her uncooperation in finalizing documents, which Motion was granted on July 20, 2006. (R. vol. 1, docs. 19, 21). Prior to being allowed to withdraw by the Court, Donald Rissler made two attempts to get Denise J. Dehning to come in, work on whatever changes needed to be made to the documents, and execute them. (R. vol. 3, def. ex. 10, 13). Denise J. Dehning, at first, testified that Donald Rissler did not contact her to work on the documents after she left the office but later conceded that Mr. Rissler had written her two letters on that subject, but that she still refused to finalize the settlement with Mr. Rissler. (R. vol. 4, pp. 88-90).

Denise J. Dehning then had attorney Aparna Durbin write a settlement letter to CDS's attorney demanding $70,000.00 instead of the $30,000.00 agreed upon as well as other material changes to the settlement entered into by the parties on April 2,

2006. (R. vol. 2, doc. 91). The attorney for CDS responded that while they were willing to work on the language of the Release and the Independent Contractor Agreement, they were not willing to vary the terms of the settlement agreement reached on April 3, 2006. (R. vol. 2, doc. 92).

Denise J. Dehning not only refused to sign an independent contractor agreement, but failed to show for work in August of 2006. (R. vol. 4, pp. 33-34, 48). As a result, CDS was forced to hire another physical therapist in order to service their children under federal guidelines. (R. vol. 4, p. 34).

Attorney Donna Courtney represented Denise J. Dehning at the hearing on the Motion to Enforce the Settlement Agreement held on December 1, 2006. (R. vol. 4). In her opening statement Donna Courtney, referring to Mr. Vlastos, the mediator, stated:

> MS. COURTNEY: Yes, Your Honor. And he did a fine job, your Honor. He mediated very well. My client felt that he advocated for her and she did – that's the point that I think is missing here, she did agree to everything Mr. Vlastos had said. One of the things –
>
> THE COURT: At the end of the settlement conference –
>
> MS. COURTNEY: Absolutely. One of the things that he –
>
> THE COURT: She assented to the agreement.

> MS. COURTNEY: Absolutely she did, Your Honor. The issue isn't that.
>
> THE COURT: Then at that point –
>
> MS. COURTNEY: Un-huh.
>
> THE COURT: – the settlement was made.
>
> MS. COURTNEY: Absolutely.

(R. vol. 3, def. ex. 1).

In response to further questioning by the Court, Donna Courtney stated in her opening:

> THE COURT: And she assented to the agreement. She made an agreement. I guess they probably didn't shake hands on it, but she still assented to it.
>
> MS. COURTNEY: They did make the agreement.

(R. vol. 4, p. 14).

At the hearing held on December 1, 2006, on the Motion to Enforce the Settlement Agreement, the Honorable Judge Clarence A. Brimmer ordered the agreement as set out in Mr. Vlastos' letter of April 4, 2006, to be upheld and found that Denise J. Dehning had waived her right to an independent contractor position with CDS. (R. vol. 1, doc. 43).

II. ARGUMENT FOR DENYING THE WRIT

A. Summary Of Argument

"A Petition for a Writ of Certiorari will be granted only for compelling reasons." Rule 10, Considerations Governing Review on Certiorari, Rules of the Supreme Court of the United States. "A Petition for a Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rule 10 of the Rules of the Supreme Court of the United States. The Petition fails to put forth any compelling reasons to justify further review of this matter.

The underlying allegations of sexual harassment constitute neither harassment nor sexual harassment under the law and was so ruled upon by the EEOC. See also *Alder v. WalMart Stores, Inc.*, 144 F.3d 664 (10th Cir. 1998); *EEOC v. PVF*, F.3d 790 (10th Cir. 2007). Since making the allegations, Denise Dehning has embarked upon a crusade and anyone who has not agreed with her, which is everyone, including her own attorneys and the administrative and judicial branch of the federal government, either gets grieved, sued, or labeled as incompetent, a perjurer, an alcoholic, or "stroke impaired and hearing impaired."

The decision of the Tenth Circuit Court of Appeals, as well as the underlying decision of the United States District Court for the District of Wyoming follow the standard rules of law for contract formation and interpretation and are fully substantiated by

the underlying factual record, including the testimony of Denise Dehning, herself.

B. Plaintiff's Allegations That Her Constitutional Rights To Due Process Have Been Violated By A Body Designed To Protect Such Rights.

Petitioner Denise Dehning's argument under this question presented is difficult at best to respond to. There are no citations to the record. Most of what Ms. Dehning sets out as facts is simply not in the record anywhere. The argument is supported by neither citation to legal precedent, nor coherent argument.

Denise Dehning submitted her Appeal to the Tenth Circuit, which affirmed the District Court ruling upholding the Settlement Agreement entered into by the parties. Apparently because she was not on the automatic email list, she did not automatically receive a copy of the decision. Denise Dehning nevertheless, discovered that a decision had been entered and received a copy. She filed a Petition for Rehearing, which Petition for Rehearing was denied. She then petitioned for a Writ of Certiorari to the United States Supreme Court.

Denise Dehning has had her full remedies under the law and has had multiple opportunities to be heard and has been heard. There has been no denial of due process.

C. Plaintiff's Allegations That The Tenth Circuit Erred In Affirming A Decision Of A District Court Clearly Conflicting With Contract Law Established In All Jurisdictions.

1. Meeting Of The Minds

As Allen B. Johnson, Chief Judge for the District of Wyoming, stated in *Brockman v. Sweetwater County School District #1*, 826 F. Supp. 1328 (USDC, District of Wyoming, 1993):

> It is an inherent power of this Court to enforce Agreements entered into in settlement of litigation. *Eastern Energy, Inc. v. Unico Oil & Gas, Inc.*, 861 F.2d 1379, 1380 (5th Cir. 1988). Federal courts have the intrinsic authority and equitable power to enforce compromise agreements entered into before them, even where such agreements have not been reduced to writing. *Bogwater North America Corp. v. Murray Machinery*, 773 F.2d 71, 77 (6th Cir. 1985).

Construction of a settlement agreement is generally governed by State law. *Brockman v. Sweetwater County School District #1*, 25 F.3d 1055 (10th Cir. 1994). Wyoming law favors settlement of litigation. *Peters Grazing Ass'n v. Legerski*, 544 P.2d 449 (Wyo. 1975); *Brockman*, id.

"The existence of a contract requires a meeting of the minds of the parties to it." *Wyoming Sawmills, Inc. v. Morris*, 756 P.2d 774, 775 (Wyo. 1988); *Jackson Hole Builders v. Piros*, 654 P.2d 120 (Wyo. 1982).

"An unconditional, timely acceptance of an offer, properly communicated to the offeror, constitutes a meeting of the minds of the parties and establishes a contract." *Wyoming Sawmills*, ibid at p. 775. *Wyoming Sawmills* involved a disagreement concerning 230,000 board feet of green sawn logs, involving various claims and liens of four different parties. All four parties entered into negotiations both face to face between counsel and then followed up with a four way telephone conversation where the final term, not previously agreed to, was resolved. The parties were then to meet the following day to execute the written documents of settlement. The Wyoming Supreme Court found that the parties had expressed their assent to the agreement and upheld the settlement despite the fact that one of the parties refused to execute the documents.

It was quite clear, and is admitted by Denise J. Dehning that she agreed to the terms of the settlement agreement in April of 2006. Ms. Dehning now maintains that she did not understand that she would be settling both her sexual harassment claim as well as her retaliation claim against Defendants at the mediation conference and that therefore there was no meeting of the minds. The District Court found Ms. Dehning's claims to be "unrealistic." (R. vol. 4, p. 97).

On appeal, the Tenth Circuit went on to state:

> More to the point, a "unilateral mistake is not grounds 'for avoidance of the contract . . . unless the mistake was produced by the

> other party.' *Givens v. Fowler*, 984 P.2d 1092, 1096 (Wyo. 1999) . . . There is, however, no evidence that the defendants were responsible for her mistake concerning the scope of the claim included in the Agreement.

(A.1). Ms. Dehning now claims that it was not her mistake but that of CDS (and apparently her attorney Don Rissler and the mediator as well). However, any confusion by CDS as to the scope of the Settlement was caused by the wording of the Complaint, the Mediation Statement submitted by Ms. Dehning's attorney, which she approved, and indeed by the course of the mediation and the subsequent Settlement Agreement terms agreed to by Ms. Dehning, which included settlement of all claims.

The evidence that Denise J. Dehning knew that the mediation and subsequent settlement agreement included both the retaliation claim and the sexual harassment claim is more than substantial, it is overwhelming and uncontradicted:

1. The Complaint filed by Denise J. Dehning included both allegations of sexual harassment and retaliation. (R. vol. 1, doc. 1 ¶ 11, 12, 13, 15, 34);

2. Both parties were requested by Mr. Vlastos to submit a Confidential Mediation Statement prior to the mediation. Denise Dehning admitted in her testimony that she reviewed the Confidential Mediation Statement prior to its submission to Mr. Vlastos and approved of the statement, with minor changes. (R. vol. 4, pp. 42-44, 78-79). This Confidential Mediation Statement starts out: "This is a sexual

harassment and retaliation case." (R. vol.3, def. ex. 9). The Confidential Mediation Statement then went into certain facts alleging sexual harassment by two CDS employees as well as the facts surrounding the retaliation claim. (R. vol. 3, def. ex. 9).

3. Denise J. Dehning admitted that she agreed to the terms at the mediation on April 3, 2006, as cited by Mr. Vlastos which included:

> For the consideration of Thirty Thousand Dollars ($30,000.00) to be paid to Plaintiff by Defendant, **Plaintiff shall execute the appropriate Release document wherein Plaintiff releases all claims, known or unknown against Defendant.** Further, Plaintiff will authorize the dismissal of this litigation with prejudice to Plaintiff.

(Emphasis added) (R. vol. 3, def. ex. 1) (R. vol. 4, pp. 41-42).

4. Donald Rissler, Denise J. Dehning's counsel at the mediation, testified that the mediation included both the sexual harassment as well as the retaliation claim and that both the sexual harassment and retaliation claims were addressed. (R. vol. 3, def. ex. 9; vol. 4, pp. 60-62). He further testified that Denise J. Dehning came to the mediation with a book on sexual harassment and referred to sections on sexual harassment during the mediation. (R. vol. 4, p. 61).

5. Al McClelland, Director at CDS, testified that he understood that the settlement covered all "issues", for all "the individual Defendants", on all "sexual harassment" claims. (R. vol. 4, pp. 35-36).

6. The mediator, Joseph Vlastos, testified that he understood that Denise J. Dehning had filed a sexual harassment lawsuit. (R. vol. 4, p. 18). Mr. Vlastos reviewed the Mediation Statement, Defense Exhibit 9, submitted by Denise J. Dehning and her attorney where they set out the fact it was a sexual harassment and retaliation case and included the underlying facts of the sexual harassment and retaliation claims. (R. vol. 4, pp. 18-19). Mr. Vlastos stated all issues were discussed during the mediation and none were excluded. (R. vol. 4, p. 19). The terms, which he reviewed with all parties, and to which all parties agreed on April 3, 2006, included the release of all claims, known and unknown, against the Defendants. (R. vol. 4, pp. 23, 29).

7. At the December 1, 2006 hearing Denise J. Dehning's counsel stated nine times, during opening, taking of testimony and during closing, that Denise J. Dehning agreed to everything Mr. Vlastos said in the settlement agreement letter of April 4, 2006 and that there were no problems with the Settlement Agreement. (R. vol. 4, pp. 10, 11, 13, 14, 68, 81, 94-95).

Wyoming has adopted the objective theory of contract formation, whereby a single "contractual obligation is imposed not on the basis of the subjective intent of the parties, but rather upon the outward

manifestation of a party's assent sufficient to create reasonable reliance by the other party." *McDonald v. Mobil Coal Producing, Inc.*, 820 P.2d 986, 990 (Wyo. 1991).

Denise J. Dehning's outward manifestation of assent was witnessed by the mediator, the attorneys, and the other parties and was admitted to by Denise J. Dehning herself.

All essential terms were agreed upon at the settlement conference held on April 3, 2006. "An agreement to make a written contract where the terms are mutually understood and agreed on in all respects is as binding as the written contract would be if it had been executed." *Wyoming Sawmills*, supra at p. 776; *Robert W. Anderson Housewrecking and Excavating, Inc. v. Board of Trustees, School District No. 25, Fremont County, Wyoming*, 681 P.2d 1326, 1331 (Wyo. 1984).

All parties have acknowledged the material terms of the settlement. Denise J. Dehning's claim that there was not a meeting of the minds is without basis in the record.

2. Parties Intended To Complete The Agreement In Writing.

Denise J. Dehning claims that the parties intended to complete the settlement in writing and since the release and independent contractor agreement were not executed by her, there was no settlement.

As noted in Mr. Vlastos' letter of April 4, 2006, the parties agreed that Mr. Vlastos would set forth the terms in writing by way of a letter to the parties' attorneys. (R. vol. 3, def. ex. 1). All testified, including Denise J. Dehning, that the letter sent by Mr. Vlastos on April 4, 2006, contained the terms of the agreed settlement. (R. vol. 4, pp. 22-27, 32, 41-42, 59-60). Included as two of the nine terms of settlement were:

(1) A release would be prepared "wherein Plaintiff releases all claims, known or unknown against Defendants" and;

(2) An Independent Contractor Agreement would be prepared whose terms were set out in paragraph 2 of the letter.

Ms. Dehning claims that the parties expected the whole agreement to be embodied in an agreement other than Mr. Vlastos' letter is unsupported by the record. The record only reflects that all the material terms of the settlement, including the material terms of the release and independent contractor agreement, were included in the Vlastos letter of June 4, 2006.

Denise J. Dehning refused to sign the papers as written and then refused to work on the language of the documents, instead preferring to fire her attorney. (R. vol. 4, pp. 48, 83-90). After waiting four months, Ms. Dehning had another attorney ask for more money and additional terms. (R. vol. 2, doc. 91).

The District Court's decision ratifying the Settlement Agreement was not clearly erroneous. (R. vol. 4, p. 96).

D. The Finding Of The District Court That The Statute Of Frauds Was Inapplicable Is Not Clearly Erroneous.

The Tenth Circuit held:

> Ms. Dehning separately argues the employment agreement portion of the settlement violated the statute of frauds because it was not in writing. This argument is, however, irrelevant in light of the district court's conclusion that "the independent contractor agreement has been waived[.]" ***Id.***, Vol. IV at 98. Because the district court did not enforce the employment agreement, we do not address whether the statute of frauds applies. See *Orr v. City of Albuquerque*, 417 F.3d 1144, 1154 (10th Cir. 2005) (holding we will not decide issues that do not affect the outcome of a dispute).

Ms. Dehning does not address the issue of waiver, but simply wants to avoid the Settlement Agreement she admitted she agreed to, claiming it is in violation of the statute of frauds.

Not only did Ms. Dehning waive any right to the independent contractor portion of the settlement agreement, but the judicial admission exception would exclude the application of the statute of frauds. The judicial exception allows the courts to enforce oral

agreements as long as the party against whom enforcement is sought has admitted in court or during discovery that an oral agreement existed. *Gibson v. Arnold*, 288 F.3d 1242 (10th Cir. 2002); *Flight Systems, Inc. v. Electric Data Systems, Corp.*, 112 F.3d 124 (3rd Cir. 1997). *Clay v. Hanson*, 536 A.2d 1097 (D.C. 1988); 73 *Am. Jur. 2d*, Statute of Frauds § 478. Where the making of a contract is admitted no additional writing is necessary for protection against fraud, and the contract becomes enforceable notwithstanding the provisions of the Statute of Frauds. *Dangerfield v. Markel*, 252 N.W.2d 184 (N.D. 1977).

"The statute of frauds was enacted to prevent fraud, not to aid it, and should receive a reasonable interpretation with that end in view. The great majority of courts have always endeavored to keep that principle uppermost in rendering their decisions." *Mead v. Leo Sheep Co.*, 232 P. 511, 515 (Wyo. 1925); *Wallis v. Bosler*, 246 P.2d 771, 777 (Wyo. 1952).

III. CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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